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In the Supreme Court of ~~Pennsylvania~~ the United States

October Term, 1954

No. ~~220~~ 10

COMMONWEALTH OF PENNSYLVANIA
Petitioner

v.

STEVE NELSON
Respondent

Petition for a Writ of Certiorari to
The Supreme Court of Pennsylvania

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I.

The Federal government, by enacting the Smith Act, has not preempted the field of sedition or superseded the Sedition Act of Pennsylvania.

The authorities cited in Point I in the memorandum of respondent do not establish a contrary position of respondent.

Tennessee v. Davis, 100 U. S. 257 (1879), involves no question of total or partial occupation of the field. It upheld an Act of Congress which provided that when a civil suit was commenced in any court of the state against any revenue officer of the United States, such suit might be removed for trial into the Federal Circuit Court.

This court reasoned that this right of removal was necessary to preserve the acknowledged powers of the Federal government (p. 266).

In **Automobile Workers v. O'Brien**, 339 U. S. 454 (1950), a Michigan law which prohibited a strike unless a majority of the employes authorized it in an election conducted under the State statute, was held to be in conflict with the National Labor Relations Act (p. 458).

Argument

In **United States v. Hill**, 248 U. S. 420 (1919), an Act of Congress which forbade any person to order or cause intoxicating liquors to be transported in interstate commerce into a state which prohibited the manufacture or sale or same, was held constitutional, although the statute of West Virginia permitted a person to bring liquor into the state for his own personal use.

In **Adams Express Co. v. New York**, 232 U. S. 14 (1914), and **Platt v. New York**, 232 U. S. 35 (1914), this court held that an ordinance of New York City requiring that express drivers have a city license for transacting interstate commerce business violated the Commerce Clause.

In **Rice v. Santa Fe Elevator Corp.**, 331 U. S. 218 (1947), the Act of Congress expressly provided that the power of the Secretary of Agriculture "shall be exclusive with respect to all persons" (p. 233). In contrast, in **Rice v. Chicago Board of Trade**, 331 U. S. 247 (1947), the act contained no declaration by Congress that regulation should be exclusive of state regulation (p. 253).

Other decisions, not cited by respondent, are:

California v. Zook, 336 U. S. 725 (1949), in which this court said:

> "* * * While the statute says nothing expressly on this point and we are aided by no legislative history directly in point, we know that normally congressional purpose to displace local laws must be clearly manifested.

H. P. Welch Co. v. New Hampshire, 306 U. S. 79, and cases cited; Maurer v. Hamilton, 309 U. S. 598, 614; Kelly v. Washington, 302 U. S. 1, 11, 14; Mintz v. Baldwin, 289 U. S. 346. Or if the claim is conflict in terms, it 'must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation.' * * *" (p. 733)

Again in **Bethlehem Steel Co. v. State Board,** 330 U. S. 767 (1947), Mr. Justice Frankfurter said:

"* * * Federal legislation of this character must be construed with due regard to accommodation between the assertions of new federal authority and the functions of the individual States, as reflecting the historic and persistent concerns of our dual system of government. Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority. To construe federal legislation so as not needlessly to forbid pre-existing State authority is to respect our federal system. Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States." (p. 780)

On page 3 of his brief respondent cites the case of **Hines v. Davidowitz,** 312 U. S. 52 (1941). This case has been distinguished on pp. 35-37 in our petition on the ground that it dealt with foreign relations over which the Constitution gives the Federal government exclusive power.

State Sedition Laws are not concerned with foreign affairs or any subject, the regulation of which is given exclusively to Congress. On the contrary, each state enacted its sedition law to protect life and property within its own territory. These laws deal with internal, not foreign affairs, with acts committed within the geographical limits of the state, not with the relations with foreign nations. The Pennsylvania Sedition Act prohibits acts to overthrow the government of the United States only when such acts are committed within that state.

It is unbelievable, we submit, that Congress intended to make exclusive the power to enact a type of law which the Federal government has no police organization to enforce. The Federal government has no police organization to protect the life and property of citizens which would inevitably be destroyed in any effort to overthrow the government of the United States by force.

There is not a single Federal official in Pennsylvania, who could be called upon to protect these. The Federal government provides no local police protection whatever.

Argument

Any movement to overthrow the government of the United States would begin in some state. In Pennsylvania, the only protection would be afforded by the State Police and by police of cities, boroughs and townships. They would be the only officials available to check the movement and to protect munition plants, railroads, airports, bridges and public utilities.

The Federal government has not taken the position that the Smith Act superseded the Sedition Law of the states, and has not objected to the enforcement of these laws by the states.

The provisions of the Smith Act have been in force continuously since 1940. The so-called sedition provisions which the Act of May 16, 1918, 40 Stat. 553, added to the Espionage Act of June 15, 1917, 40 Stat. 217, were in force from 1918 to 1921. Nevertheless, no Federal court has questioned the validity of a state sedition law or, at any time, held that they were superseded by Federal legislation on the same subject.

As Chief Justice Stone said in **Penn Dairies v. Milk Control Commission**, 318 U. S. 261 (1943):

> "* * * An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. * * *" (p. 275).

On page 7, respondent argues that no federal statute was in force when **Gitlow v. New York**,

268 U. S. 652, and **Whitney v. California,** 274 U. S. 357, were decided. Each of these cases concerned acts committed during the period when the provisions added by the amendment of May 16, 1918, 40 Stat. 553, to the Espionage Act of June 15, 1917, 40 Stat. 217, were in force. This amendment did make it a crime to utter "any language intended to incite, provoke or encourage resistance to the United States".

In **Gilbert v. Minnesota,** 254 U. S. 325 (1920), (quoted in petition, pp. 18, 27-28), this court did hold that the provisions in Section 3 of the Espionage Act of 1917, making it a crime to cause insubordination in the military forces of the United States or to obstruct the recruiting services of the United States, did not supersede the Minnesota statute which made it a misdemeanor to advocate that citizens should not assist in carrying on a war, and should not enlist in the armed forces of the United States.

This Federal statute dealt with the matter of greatest concern to the United States, and the provisions of the state and federal law were substantially identical. Nevertheless, this court held no supersession. A fortiorari, we submit, the Smith Act would not supersede the Pennsylvania Sedition Act.

On page 5, the brief of respondent relies upon the fact that the provisions, known as the Smith Act constitute Title I, and the provisions for the registration of aliens constitute Title III, of Pub-

lic Act No. 70, approved on June 28, 1940, 54 Stat. 670, known as the Smith Act.

However, Titles I and III deal with entirely different subjects. Title I is punitive; Title III is regulatory.

The title of the act is as follows:

> "An Act
>
> "To prohibit certain subversive activities; to amend certain provisions of law with respect to the admission and deportation of aliens; to require the fingerprinting and registration of aliens; and for other purposes."

The title of the act enumerates three different subjects separately; subversive activities, admission and importation of aliens and registration of aliens.

The Federal Constitution imposes no limitation upon the number or diversity of subjects which may be included in the same act, as purely a matter of convenience. The fact that several provisions appear in the same Act of Congress does not indicate that they are cognate or that there is any connection between them. The practice of embodying diverse subjects in a single Act of Congress is as old as Congress itself.

In **Hadden v. The Collector**, 72 U. S. (5 Wall.) 107 (1866), Mr. Justice Fields, speaking of Acts of Congress, said:

"* * * Every one who has had occasion to examine them has found the most incongruous provisions, having no reference to the matter specified in the title. Thus the law regulating appeals in Mexican land cases to the District Courts of the United States from the board of commissioners, created under the act of March 3d, 1851, is found in an act entitled 'An act making appropriations for the civil and diplomatic expenses of the government for the year ending June 30th, 1853, and for other purposes.' The law declaring that in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions when he is a party to or interested in the issue tried, is contained in a proviso to a section in the appropriation act of 1864, the section itself directing an appropriation for detecting and punishing the counterfeiting of the securities and coin of the United States." (pp. 110-111)

Any connection between Title I and Title III of the Act of June 28, 1940, was terminated when Sections 1-5 of this act—which composed Title I—were expressly repealed by the Code of Crimes and Criminal Procedure of June 25, 1948, Section 21, 62 Stat. 862, 867.

Section 2385 of the Code is now entirely separated from the provisions for registration of aliens. Any basis for any argument that Title III indicates that Congress intended also to preempt

the field of Title I which prohibited advocating the overthrow of the government by force, has, therefore, ceased to exist.

Mr. Justice Jones states (App. 71a) that the duty of suppressing insurrections in a state rests directly upon the government of the United States, by virtue of Section 4 of Article IV of the Federal Constitution which provides:

> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

The Learned Justice further states:

> "* * * Federal pre-emption could hardly be more clearly indicated." (App. 71a)

With all deference, we submitted on the contrary that:

(1) The duty to protect is limited to protection against "invasion," that is, attacks from without.

(2) The duty of the Federal government to protect against "domestic violence", arises only "on application of the Legislature or of the executive". The necessity of an application from a state necessarily implies that the state has the power to defend itself and will do so unless the

violence reaches a point where the state is obliged to call upon the Federal government.

There is no evidence or question of invasion in this case. The duty to protect the state against domestic violence is not absolute, but is conditioned upon an application of the Legislature or executive.

This provision evinces no intention to deprive the state of the power of self-preservation. See: **Gitlow v. New York,** quoted on page 26 of our petition.

We have already quoted in our petition (pp. 38, 41); the authorities which hold that the Federal Constitution left the administration of criminal justice to the states. We add the statement of Mr. Justice Jackson in Irvine v. California, 347 U. S. 128, (1945):

> "* * * The chief burden of administering criminal justice rests upon state courts. * * *" (p. 134)

II.

Questions of error during the trial and the sufficiency of proof are irrelevant.

The final judgment of the Supreme Court of Pennsylvania was:

> "The judgment is reversed and the indictment quashed." (p. 79a)

The opinion of the, Mr. Justice Jones, refers to questions of trial error and proof but does not discuss or make any adjudication of the same. Mr. Justice Jones said:

> "But, with any or all of that, we need not now be concerned. * * *" (p. 63a)

Therefore, propriety of the order quashing the indictment is the only question involved in this case.

Mr. Justice Jones also said:

> "* * * Out of all the voluminous testimony, we have not found, nor has anyone pointed to, a single word directed against the Government of Pennsylvania. * * *" (70a)

With deference to this opinion, we submit that there was evidence of an act of the defendant against the Commonwealth of Pennsylvania, as

well as against the United States. As Mr. Justice Jones said:

> "* * * * Indeed, it is difficult to conceive of an act of sedition against a State in our federated system that is not at once an act of sedition against the Government of the United States,—the Union of the forty-eight component States. * * *" (p. 70a)

This court has held that a *state* may punish an act of advocating the overthrow of the government of the United States by force and violence. (See Petition for Certiorari, pp. 16-24)

There was, however, evidence of acts and utterances against Pennsylvania. Even an attempt to overthrow the government of the United States would begin with and involve the overthrow of the government of the *state*. It would not and could not be limited to the government of the United States. One of the first steps would be to seize and destroy property of strategic and military value, such as munition plants, arsenals, navy yards, railroads, airports and public utilities. All of these Pennsylvania has in unusual quantities. If the effort of revolt progressed, vast destruction of human life and property would be inevitable. This would work a plain violation of the laws of Pennsylvania and a direct injury to the people thereof.

In **Gitlow v. New York**, 268 U. S. 652 (1925), the state statute made it a crime to advocate the

overthrow of "organized government by force and violence". This court held that the state might prohibit and punish advocating overthrow of the government of the United States and the several other states. (See pp. 16-24)

Nelson was selling, in Pittsburgh, Pennsylvania, printed matter advocating the overthrow of government. The literature was not limited to the government of the United States (R. 1441). He directed the plan of the Communist party to infiltrate into the steel and other basic industries in Pittsburgh, and assigned himself to the job of infiltrating into the plants of the Westinghouse Electric and Machine Company engaged in the manufacture of war defense equipment and material in Pittsburgh (R. 1443).

On May 20, 1950, respondent Nelson, telegraphed to Eugene Dennis, General Secretary of the Communist party, as follows:

> "'Night letter, May 29, 1950.
>
> "Eugene Dennis, Federal House of Detention
>
> "427 West Street, New York City, New York,
>
> "Western Pennsylvania Party Conference to launch crusade for peace and building workers circulation sends you warmest greetings. Recruited five workers for basic industry for the goal of 25 in the campaign named in your honor. Conference pledged re-

cruiting remaining 20 by July 16. Further pledge to make real drive for peace and develop mass circulation of Worker, pledge to be worthy of example you set as champion fighter for peace in U. S. A. Wish you best of health and will fight for your earliest return. Signed. Steve Nelson.'" (R. 763)

At the date of this telegram, Eugene Dennis was in prison and his conviction was later upheld in **Dennis v. United States,** 341 U. S. 494.

Matt Cvetic, who was specially assigned by the Federal Bureau of Investigation to ascertain the aims of the Communist party of Western Pennsylvania, testified that at a meeting at the "Culture Center" on Forbes Street, Pittsburgh, Steve Nelson made a report to the Communist party members present there, and read from a book entitled, "A Statement of the Bolsheviks Supported Wars to Liberate the People from Capitalistic Survey" (R. 1451).

The notes of the trial covered approximately 2700 pages and by reason of the poverty affidavit of respondent, were not printed for the Supreme Court of Pennsylvania, but a typewritten copy has been filed with the Clerk of this court, as part of the transcript of record. It is our position that the record of evidence is immaterial because the Supreme Court of Pennsylvania quashed the indictment, and this inquiry into the notes of trial will not be pursued any further.

Section 3231

This section has been discussed on pages 42-45 of the petition for certiorari. The section provides:

> "The District Courts of the United States shall have original jurisdiction, exclusive of the courts of the states, of all offenses against the laws of the United States.
>
> "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof."

The first sentence provides that the district courts of the United States "shall have original jurisdiction * * * of all offenses against the laws of the United States".

In like manner, the second sentence preserved jurisdiction of "the courts of the several states under the laws thereof".

Comparison with the first sentence shows that this second sentence means jurisdiction of all crimes under the laws thereof—i. e. the states.

Respondent argues:

> "To argue the applicability of §3231 therefore is to beg the entire question before this Court. That section becomes applicable only if we assume the validity of the very law whose validity is challenged."

We disagree. The Pennsylvania Sedition Act is not invalid. The only question is whether it was superseded by the Smith Act.

Again respondent says:

> "* * * The second sentence obviously was added to preserve the pre-existing jurisdiction of the state courts which might otherwise have been cast in doubt by the language of the first section. * * *"

The purpose of the second sentence was to avoid or repel any inference that anything in this Code Title XVIII should take away or impair the jurisdiction of the courts of the several states under the laws thereof. It necessarily follows that Section 2385 of the Code, embodying Title I of the Smith Act, did not take away or impair jurisdiction of the state court under its sedition act, and does not supersede that act.

Respondent also argues:

> "* * * But the statute is not operable because it has been superseded by the Smith Act."

However, Sections 1-5 of the Smith Act have been expressly repealed by the Federal Code of Crimes and Criminal Procedure. See Section 21, 62 Stat. 862-867. In their place, there now is a new and separate Section 2385 of the Federal Code. Title I of the Smith Act no longer has any legal force and cannot supersede any law.

Section 2385 is a new and independent enactment.

Title I of the Smith Act has now no validity because:

(a) it has been expressly repealed.

(b) even if it had not been so repealed, inclusion of the provisions of an earlier statute "in the code does not operate as a reenactment". (**Smiley v. Hohn,** 285 U. S. 355, 373 (1932))

Furthermore, the effect of the repeal of Title I of the Smith Act was to completely divorce that provision from Title III of the Smith Act. It is no longer possible to argue that because Title III occupied the field of registration of elements, Title I also occupied the field of the regulation of sedition.

III.

The writ of certiorari should be granted.

As Mr. Justice Jones said in the majority opinion:

"The question is obviously one of greatest importance. * * *." (p. 64a)

In the concurring opinion, it was said:

"* * * We assume that the question involved, being obviously one of national importance, will be finally determined by the Supreme Court of the United States." (p. 80a)

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